

she asked him to "explain whether the cancellation [of RBC's permit] was consistent with the FCC policy encouraging minority ownership of broadcast stations." Press Broadcasting Company, Inc. v. FCC, 59 F.3d at 1368. ^{42/} Ms. Bush had very limited recollection of what she knew about the status of the RBC applications at the time of her calls to the staff, what (if anything) Ms. Polivy told her, and what she said to Messrs. Stewart and Pendarvis. Tr. 572-75. She did not recall whether Ms. Polivy asked her to call anyone in particular at the Commission, but Ms. Bush did call Mr. Stewart. Tr. 571.

137. Shortly after speaking with Mr. Stewart, Ms. Bush called Ms. Polivy to report on her conversation with Mr. Stewart. Tr. 573. Shortly after that, Mr. Pendarvis called Ms. Bush (still at her New York home on maternity leave) at Mr. Stewart's request. Tr. 574. Ms. Bush told Mr. Pendarvis that she understood that certain issues relating to the RBC applications had not been resolved, although she did not know what those matters were. Tr. 574-575. After speaking with Mr. Pendarvis, Ms. Bush called Ms. Polivy and advised her of the Pendarvis conversation. Tr. 575.

138. Ms. Bush had been a member of the bar for more than 10 years as of June, 1993. Tr. 578. Her primary professional practice was before the Commission from 1982-1987, Tr. 580, and she was familiar with the ex parte rules, Tr. 578. Before

^{42/} Ms. Bush testified that she could not recall whether she had asked Mr. Stewart that question, although she did not deny that she did ask him that. Tr. 572-73.

contacting Messrs. Stewart and Pendarvis, Ms. Bush made no independent inquiry at all concerning whether the proceeding might be restricted, and Ms. Polivy never advised her that it was restricted, Tr. 578-79, or even that Press had filed pleadings opposing the RBC applications -- although Ms. Bush believed that she was aware, prior to June, 1993, of litigation between Press and RBC, Tr. 589. In her conversations with Messrs. Stewart and Pendarvis, Ms. Bush made no mention of the ex parte rules or their potential applicability to the RBC applications. Press Exh. 19, pp. 9-11; Press Exh. 21, pp. 8-10.

139. When asked whether she understood herself to be under any obligation at all to inquire into the status of a proceeding before contacting FCC staffmembers about that proceeding, Ms. Bush declined to answer, saying instead that it was the staffperson's responsibility, and not hers, to determine whether ex parte restrictions apply. Tr. 578. She stated that, as a matter of practice, she would make such inquiry "if I was aware that the parties were in litigation". Tr. 588. She did not explain why, if that were the case, she made no such inquiry here, in spite of her testimony that she believed that she was aware, prior to June, 1993, of the pendency of Press' pleadings. Tr. 589.

D. The July 1, 1993 Meeting

140. After learning of Ms. Kreiman's decision to deny RBC's June, 1991 extension application, Ms. Polivy also contacted Messrs. Stewart and Pendarvis to attempt to set up a meeting with

them. Ms. Polivy first called Mr. Stewart, but was unable to get through to him; she then called Mr. Pendarvis and made tentative arrangements for a meeting; Mr. Stewart subsequently called and, when advised of the tentative arrangements, suggested that the meeting be held in his office. Tr. 451-452. The Renouf & Polivy billing ledger (Press Exh. 2) reflects two conversations with Mr. Pendarvis and one conversation with Mr. Stewart on June 30, 1993.

141. Ms. Polivy testified that she was not sure whether she had made her first call to Mr. Stewart before hearing back from Ms. Bush about her conversation with Mr. Pendarvis. Tr. 449. However, in view of the fact that Ms. Bush's conversations with Messrs. Stewart and Pendarvis, and her follow-up calls to Ms. Polivy, appear to have occurred no later than June 29 -- see e.g., Press Exh. 2; Paragraphs 128-129, supra -- and in view of the entries in the Renouf & Polivy billing ledger, and further in view of Mr. Pendarvis' recollection that Ms. Polivy's call to him came after his conversation with Ms. Bush, Press Exh. 21, p. 9, it is found that it is most likely that Ms. Polivy was advised by Ms. Bush about her conversations with Messrs. Stewart and Pendarvis before Ms. Polivy arranged for the July 1, 1993 meeting. ^{43/} In any event, it is clear that Ms. Polivy knew of

^{43/} Further circumstantial support for this finding is provided by the fact that, in setting up the meeting, Ms. Polivy made no effort to contact Ms. Kreisman. Tr. 455-56. Since Ms. Kreisman had signed the letter denying the RBC application, it would have been logical for Ms. Polivy to attempt to contact Ms. Kreisman. At hearing, Ms. Polivy attempted to explain her failure to call
(continued...)

Ms. Bush's conversations with Messrs. Stewart and Pendarvis prior to the July 1, 1993 meeting. ^{44/}

142. In her conversations with Messrs. Stewart and Pendarvis setting up the meeting, Ms. Polivy did not mention the ex parte rules, or their applicability to the RBC applications, or the Sandifer letter. Press Exh. 19, pp. 11-13; Press Exh. 21, pp. 11-12; Tr. 467. Ms. Polivy did contend that, in her conversation with Mr. Pendarvis setting up the meeting, he inquired as to whether there had been any objections, and she responded:

yes, Press had filed an informal objection. It was late. They filed a reconsideration to the informal

^{43/} (...continued)

Ms. Kreisman by suggesting, incredibly, that Ms. Kreisman -- who, again, had signed the June 18, 1993 letter disposing of the RBC applications -- "may not have been involved in" the letter. Tr. 454. But in deposition, Ms. Polivy had suggested that her failure to call Ms. Kreisman was attributable to a belief that Ms. Kreisman was out of town. Tr. 455. A more likely explanation of Ms. Polivy's failure to contact Ms. Kreisman is the fact that Ms. Bush had spoken only with Messrs. Stewart and Pendarvis, so the path to them (as opposed to Ms. Kreisman) had already been cleared.

^{44/} Ms. Polivy acknowledged that, in August, 1993 -- more than a month after the meeting -- she had advised the Commission's OIG that, as of August, 1993, she was not aware of whom Ms. Bush had spoken to, although Ms. Polivy thought it might have been Rod Porter. Tr. 456-57. On cross-examination, she asserted that, as of her interview with the OIG, she did believe that Ms. Bush had spoken with Mr. Porter, and that Ms. Bush had advised her that Ms. Bush had spoken with Messrs. Stewart and Pendarvis after that August, 1993 interview. Id. This testimony is inconsistent with the testimony of both Ms. Polivy (Tr. 447-48) and Ms. Bush (Tr. 575-77) to the effect that Ms. Bush had reported back to Ms. Polivy right away after Ms. Bush spoke with both Messrs. Stewart and Pendarvis. It appears that Ms. Polivy was less than honest and candid in her interview with the OIG at least with respect to the extent of her knowledge of Ms. Bush's communications with Messrs. Stewart and Pendarvis.

objection, and then the[y] filed an informal objection to the sixth extension, and they filed informal objections to everything else that we filed.

Tr. 462. ^{45/}

143. However, Mr. Pendarvis testified, under oath, that neither Ms. Bush nor Ms. Polivy had ever mentioned to him the ex parte rules or their possible applicability to the RBC applications prior to (or during) the July 1, 1993 meeting. Press Exh. 21, pp. 8-12. And Ms. Polivy acknowledged that this part of her conversation lasted "about 10 seconds", a time frame which was, according to Ms. Polivy, "as long as [Mr. Pendarvis'] attention span . . . lasts". Tr. 466. In other words, even if Ms. Polivy did mention Press' pleadings to Mr. Pendarvis prior to the meeting, she did so in a fleeting and not-wholly-accurate manner which could not have been intended to alert him to any possible restrictions which might arise from those pleadings. ^{46/}

^{45/} Ms. Polivy's characterization of Press' February, 1991 petition for reconsideration as a "reconsideration of an informal objection" is inaccurate. As the record reflects, Press' petition was filed pursuant to Section 1.106 of the Commission's rules and sought reconsideration of the grant of RBC's January, 1991 extension application.

^{46/} The record contains further basis for doubt as to the accuracy of Ms. Polivy's testimony concerning her supposed disclosure of the pending petition for reconsideration to Mr. Pendarvis. The Report of the OIG to the Chairman concerning RBC's ex parte communications indicates that, according to Ms. Polivy, she may have advised Mr. Stewart about the pendency of some informal objections; the report does not indicate, however, that she advised anyone, including Mr. Pendarvis, of the pendency of any petition for reconsideration. STS Exh. 1, p. 10. While Ms. Polivy testified that the OIG's report was not accurate in that respect, she acknowledged that RBC did not take any steps to correct the alleged inaccuracy, despite the fact that RBC was given an opportunity to comment on any and all aspects of the
(continued...)

144. At the meeting itself, which was attended by, inter alia, Mr. Rey, neither Mr. Rey nor Ms. Polivy made any reference at all to the ex parte rules, or the possible applicability of those rules to the RBC applications, or the Sandifer letter. Press Exh. 19, pp. 13-16; Press Exh. 20, pp. 11-15; Press Exh. 21, pp. 16-19.

E. Summary Concerning the Ex Parte Issue

145. Based on the foregoing, it is found that the Sandifer letter clearly placed Ms. Polivy on notice of the fact that the RBC applications were "restricted" within the meaning of the ex parte rules. That letter explained the basis of the restriction and cited the relevant rule. Ms. Polivy claims that she believed that a different rule applied (although RBC itself has conceded that the RBC applications were "restricted", a concession which undermines the credibility of Ms. Polivy's claimed reliance on a different rule). In any event, Ms. Polivy chose to ignore the plain language of the Sandifer letter and made no effort to confirm whether her claimed contrary understanding of the rules was correct. Similarly, Ms. Polivy was repeatedly advised by Mr. Gordon, within weeks of the July 1, 1993 meeting, that the proceeding was subject to ex parte restrictions.

146. Accordingly, when Ms. Polivy enlisted Ms. Bush to contact the Commission, and when Ms. Polivy herself called

⁴⁶/ (...continued)
Report of the OIG, and further despite the fact that RBC had availed itself of that opportunity. Tr. 490-98.

Messrs. Stewart and Pendarvis to arrange a meeting, Ms. Polivy did so in knowing violation of the ex parte rules. Her awareness of the impropriety of Ms. Bush's calls is implicit in her inability to explain any valid reason to have Ms. Bush call and her repeated efforts to characterize Ms. Bush's calls as "status" inquiries.

147. The true purpose of enlisting Ms. Bush was clearly to apply pressure of some sort to the Commission's staff, pressure arising from Ms. Bush's position on the Senate Telecommunications Subcommittee staff. Tr. 523. Once Ms. Bush had spoken with Mr. Stewart and Mr. Pendarvis, Ms. Polivy was then able to arrange the meeting. ^{47/}

148. At no time did Ms. Polivy ever advise any member of the Commission's staff of the ex parte restrictions about which she had been advised. Nor did she, at any time, seek any determination from any Commission staffmember concerning the correctness of her supposed assumption concerning the

^{47/} While Ms. Polivy indicated that she could not recall whether she placed her calls to Mr. Stewart and/or Mr. Pendarvis after she heard back from Ms. Bush, the evidence (as discussed above) supports a finding that she did place those calls after learning that Ms. Bush had spoken with Mr. Stewart and Mr. Pendarvis. Logically, since Ms. Kreisman had signed the letter disposing of the RBC applications, Ms. Polivy would have been expected to contact Ms. Kreisman in the first instance to discuss that letter. And yet, Ms. Kreisman is the one person Ms. Polivy did not even try to contact. Ms. Polivy's attempted explanations for that failure were inconsistent and not credible. Her lack of credibility in this connection is exacerbated by the fact that Ms. Polivy apparently sought to mislead the OIG when she reported, during her August, 1993 interview, that she did not know who Ms. Bush had spoken with (although she said she thought it might be Rod Porter).

applicability of those restrictions to the RBC applications.

VI. Findings Concerning the Credibility of Witnesses

149. Since RBC has sought to meet its evidentiary burdens of proceeding and proof almost exclusively through the testimony of four witnesses, the credibility of those witnesses is important. On the basis of the Presiding Judge's observation of each of RBC's witnesses during his/her testimony, and based further on assessment of all the evidence which has been adduced herein, it is found that the testimony of each of RBC's four witnesses was incredible in material respects.

150. Mr. Rey's testimony was inherently inconsistent on a number of important points and conflicted with his own sworn testimony in the Miami Tower Litigation. For example, he would have the Presiding Judge believe that financing from Mr. Conant was available at all times from 1984 through 1993, e.g., Tr. 754, but he also repeatedly testified that he himself believed that RBC's permit was "worthless" during the period November, 1990 to June, 1991, and that therefore he did not believe that Mr. Conant's financing was available during that period, e.g., Tr. 776-82, 921, 927. For another example, he testified that RBC's permit was not "free and clear" in April, 1993 because "[i]t was challenged by [Press] Broadcasting". Tr. 908. But he then testified that the permit was "free and clear" in the "second half of '93", Tr. 909, even though Press' challenge remained in place (and, indeed, has led to the instant hearing).

151. Similarly, Mr. Rey testified repeatedly that RBC's

failure to construct during the period November, 1990 to June, 1991 was attributable to an order of Judge Marcus issued in connection with a prehearing status conference -- but the transcript of that conference and the actual orders issued in connection therewith plainly demonstrated that Mr. Rey's self-serving testimony in the instant proceeding was not supported by the available documentary evidence.

152. Additionally, RBC's statements in its November, 1991 supplement (Jt. Exh. 5) are flatly inconsistent with its April, 1993 response to Mr. Pendarvis (Jt. Exh. 7): the former says that RBC was then proceeding with construction as of November, 1991, while the latter says that, as of November, 1991, RBC's construction efforts were "in limbo". Asked about his earlier statement, Mr. Rey claimed that the November, 1991 supplement really was contingent on grant of RBC's applications. Tr. 876. However, that claim is not supported by the actual language of the November, 1991 supplement.

153. Mr. Rey's credibility also suffers from a comparison of the written statements which he signed, first, in November, 1990 (i.e., the Complaint initiating the Miami Tower Litigation) and second, in January, 1991 (i.e., the January, 1991 extension application). In the former, he unequivocally stated that RBC did not have financing and would not be able to obtain financing, absent injunctive relief, Press Exh. 9, and he reconfirmed that in his testimony before Judge Marcus. Press Exh. 10; Tr. 920-21. But, with RBC's request for injunctive relief still pending

before Judge Marcus, in January, 1991 Mr. Rey told the Commission that RBC was financially qualified and ready, willing and able to construct. Obviously, Mr. Rey was either lying to Judge Marcus, or he was lying to the Commission. Either way, he has demonstrated himself to have virtually no credibility.

154. Similarly, Mr. Conant's testimony contradicted in material respects the sworn statement which he himself had prepared for submission to the Commission just four months earlier. The Conant Declaration was clearly drafted for the purpose of creating the impression that, in view of supposedly extensive relationships -- financial and otherwise -- between Mr. Conant and the RBC principals, Mr. Conant's supposed willingness to make an oral commitment to lend \$4 million to RBC was credible. Rainbow Exh. 4. And yet, upon cross-examination, those supposedly extensive relationships turned out to be virtually no relationships at all, and certainly not the type of relationships which would normally cause one to agree to lend \$4 million! See Paragraphs 78-83, supra.

155. Similarly, Mr. Conant seemed to contradict his own Declaration with respect to whether he (as opposed to Mr. Rey) had decided to take a "wait and see" attitude with respect to the RBC deal in December, 1990. See Footnote 27, supra. When confronted with this contradiction, Mr. Conant retreated from his testimony, saying that he would "stand on" his Declaration, Tr. 693. Through his Declaration and his testimony, Mr. Conant demonstrated himself to be less than a reliable witness.

156. As discussed above, Ms. Polivy's testimony is riddled with inconsistencies and inherently incredible testimony which is contradicted by documentary evidence as well as the direct, unbiased, credible testimony of Mr. Gordon. For example, she persisted in characterizing Ms. Bush's calls as "status" inquiries when they plainly were not. E.g., Tr. 516-24. And while Ms. Polivy would have the Presiding Judge believe that, in seeking Ms. Bush's intervention and in meeting with the MMB staff, she was acting according to a particular understanding of the ex parte rules -- i.e., that she could make merits-related presentations, but that no third party could do so, Tr. 383 -- her own conduct was inconsistent with her own supposed understanding of the rules: she herself claims not to have made any merits-related presentations to Mr. Gordon, and yet she saw no reason why Ms. Bush, a third party, could not do so.

157. Additionally, Ms. Polivy's testimony suggests that she was, at a minimum, less than candid in responding to the inquiries of the Commission's OIG. See Footnote 47, supra. And of course, the most profound basis for determining that Ms. Polivy's self-serving testimony was incredible is Mr. Gordon's testimony, which directly and convincingly contradicts Ms. Polivy's version of the Gordon-Polivy conversations. Ms. Polivy's credibility in this proceeding is negligible.

158. Finally, Ms. Bush's self-servingly limited recollection of events is suspect in view of her longstanding

professional and personal relationships not only with RBC's principals, but also with Ms. Polivy.^{48/} Further, while Ms. Bush attempted repeatedly to characterize her conversations with Messrs. Stewart and Pendarvis as "status" inquiries, she could not explain that characterization. Tr. 585-89. There is, therefore, reasonable basis in the record of this proceeding from which to conclude that Ms. Bush's testimony may have been biased in favor of RBC. While Ms. Bush was arguably more credible in some respects than the other RBC witnesses, that was simply because of (a) Ms. Bush's claimed inability to recall many details and (b) the fact that, unlike Messrs. Rey and Conant, she had not previously set forth her version of the story (as a result of which she was not in a position to contradict her own earlier statements).

159. In sum, RBC has attempted to establish its qualifications through the testimony of witnesses who have proven themselves to be less than credible and less than reliable. That lack of credibility can and does affect the weight to be accorded to their testimony in the final evaluation of all the evidence herein.

^{48/} Reflecting Ms. Bush's on-going relationship with RBC and its principals, Ms. Bush indicated that she had assisted in the preparation of a brief, filed on behalf of the Senate, which supported RBC's position in its case before the Supreme Court. Tr. 389-90.

PROPOSED CONCLUSIONS OF LAWI. Introduction

160. The HDO calls for resolution of a total of four preliminary issues -- the Failure to Construct Misrepresentation Issue, the Financial Qualifications Misrepresentation Issue, the Extension/Waiver Issue and the Ex Parte Issue -- and a final, ultimate issue based on the evidence adduced pursuant to the four preliminary issues. As set forth below, each of the four preliminary issues, and the ultimate issue, must be resolved against RBC. In light of all the evidence, RBC is not qualified to be a Commission permittee or licensee. Moreover, denial of its June, 1991 extension application (or its January, 1991 extension application) is independently mandated under clear Commission precedent irrespective of RBC's qualifications or lack thereof. Accordingly, the above-captioned applications must be denied, RBC's permit must be cancelled, its call sign deleted, and RBC must be ordered to cease operation of Station WRBW(TV).

II. The Misrepresentation/Lack of Candor Issues

161. One of the most basic and most longstanding tenets of the Commission's regulatory process is that all applicants, permittees and licensees are expected to exercise the utmost candor and honesty in their dealings with the Commission. E.g., Fox River Broadcasting, Inc., 93 FCC 2d 127 (1983); Sections 1.17 and 73.1015 of the Commission's Rules. In the Commission's view, "misrepresentation and lack of candor in an applicant's dealings with the Commission [are] serious breaches of trust." Policy

Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1211 (1986). Absolute candor is perhaps the foremost prerequisite for Commission licenseeship. E.g., Catoctin Broadcasting Corp. of New York, 2 FCC Rcd 2126 (Rev. Bd. 1987), aff'd in pertinent part, 4 FCC Rcd 2553 (1989), recon. denied, 4 FCC Rcd 6312 (1989); Mid-Ohio Communications, 104 FCC 2d 572 (Rev. Bd. 1986), rev. denied, 5 FCC Rcd 940 (1990), recon. dismissed in part, denied in part, 5 FCC Rcd 4596 (1990).

162. While "misrepresentation" and "lack of candor" may differ in certain limited respects, the gravamen of both is an intent to mislead the Commission, whether through affirmatively false statements or through evasion and failure to be fully honest and forthcoming. See, e.g., Fox River, supra. Where a party is found to have intentionally misled the Commission -- whether through misrepresentation or lack of candor, and even with respect to seemingly insignificant matters -- that party is not qualified to be a Commission regulatee. E.g., Policy Regarding Character Qualifications in Broadcast Licensing, supra; FCC v. WOKO, 329 U.S. 223 (1946); Center for the Study and Application of Black Economic Development, 10 FCC Rcd 2836, 2837, ¶6 (Rev. Bd. 1995). In this connection, the necessary intent to mislead or deceive may be found through an evaluation of relevant facts and circumstances. See, e.g., David Ortiz Radio Corp. v. FCC, 941 F.2d at 1260 (D.C. Cir. 1991) (intent to deceive can be found in "the fact of misrepresentation coupled with proof that

the party making it had knowledge of its falsity").

163. The evidence developed in this case overwhelmingly demonstrates that RBC committed misrepresentation (or, at a minimum, lack of candor) in its January, 1991 and June, 1991 extension applications with respect both to (a) the reasons for RBC's failure to construct its station and (b) RBC's financial qualifications. See supra, Paragraphs 31-102.

A. Issue Concerning Misrepresentation/Lack of Candor Surrounding RBC's Failure to Construct

164. With respect to RBC's claims concerning its failure to construct, in both of its 1991 extension applications RBC specifically represented to the Commission that the station's "construction ha[d] been delayed by a dispute with the tower owner". Jt. Exhs. 2 and 3. That statement was clearly false. The evidence adduced in the instant hearing establishes beyond any doubt that, in fact, RBC's dispute with Gannett, its tower owner, was not the cause of any delay at all. See supra, Paragraphs 31-59. Rather, RBC's failure to construct was solely attributable to the voluntary election by RBC (and its dominant principal, Mr. Rey) not to construct, an election which was motivated by RBC's (and Mr. Rey's) belief that, because of the actual and anticipated competitive conditions of the Orlando television marketplace as of late 1990 and early 1991, RBC's permit (together with any station which might be constructed pursuant thereto) was at that time "worthless". See supra, at, e.g., Paragraphs 55-59.

165. Mr. Rey, who signed both of RBC's 1991 extension applications, clearly knew that it was inaccurate to attribute RBC's delay in construction to the "dispute" with Gannett. Mr. Rey himself had testified in deposition in the Miami Tower Litigation in December, 1990 -- just one month before the January, 1991 extension application -- that he knew RBC could have constructed its station at that time:

Q: Is it your understanding as you sit there right now if you want to put the antenna up top that you can put it up at that height on the tower?

Rey: I could put it up at that height but I have to share it is what they are telling me.

Press Exh. 17.

166. However, Mr. Rey and RBC had a clear motive to tell the Commission another story. Under Section 73.3534, an extension of a construction permit will be granted only if the permittee has (a) completed construction or (b) made substantial progress in its construction or (c) been prevented from making progress as a result of factors beyond the permittee's control. Since RBC could not satisfy either of the first two criteria, it had to try to convince the Commission that forces beyond RBC's control had prevented it from going forward. Hence, RBC had a clear, improper motive when it falsely stated that construction had been delayed by the Miami Tower Litigation.

167. Far from exculpating RBC from that patent misrepresentation, Mr. Rey's testimony in the instant hearing confirms RBC's willingness and inclination to attempt to deceive the Commission. While Mr. Rey initially attempted to convince

the Presiding Judge that RBC's failure to construct was attributable to some order supposedly issued by Judge Marcus in the Miami Tower Litigation, the documentary evidence establishes that no such order was ever issued. See supra at, e.g., Paragraphs 33-43. That is, Judge Marcus never limited RBC's ability to construct. Seemingly undaunted by this, Mr. Rey also claimed that RBC's failure to construct was caused by some inability or unwillingness on Gannett's part to cooperate in RBC's construction. See supra at, e.g., Paragraphs 44-54. But, again, the documentary evidence indicated no such inability or unwillingness. To the contrary, confronted by the documentary evidence, Mr. Rey ultimately acknowledged that it was RBC, and not Gannett, which unilaterally chose to stall construction by not responding to a request from Gannett for information relative to RBC's planned installation on the tower. Id.

168. In other words, even in his testimony in this proceeding, Mr. Rey sought to mislead the Presiding Judge with demonstrably inaccurate versions of what transpired during the period November, 1990 to June, 1991. As the evidence conclusively establishes, during that period the only factor which prevented RBC from going forward was Mr. Rey's concern about the competitive marketplace and his view that, in that marketplace, RBC's permit and station would be "worthless". ^{42/}

^{42/} In testimony at the close of cross-examination by Press, Mr. Rey confirmed the wholesale lack of validity of Mr. Rey's various excuses for RBC's lack of construction. While Mr. Rey had sought to tie that lack of construction to the Miami Tower
(continued...)

Viewed in light of the evidence which was adduced, all of Mr. Rey's fanciful, and largely non-credible (see supra at, e.g., Paragraphs 150-153) testimony concerning other possible causes for the delay -- whether those causes were said to be Judge Marcus' order, or Gannett's non-cooperation, or anything else -- simply confirms his, and RBC's, willingness to mislead the Commission.

169. Accordingly, it is concluded that RBC engaged in misrepresentation and/or lack of candor with respect to its statements in its January, 1991 and June, 1991 extension applications concerning its failure to construct the station.

^{42/} (...continued)

Litigation in some way, shape or form so as, presumably, to justify RBC's representations in its January, 1991 and June, 1991 extension applications, the fact of the matter was that the Miami Tower Litigation never presented any impediment to construction. That is because it was RBC which had initiated the Miami Tower Litigation -- and, therefore, RBC could have terminated that litigation and cleared the way for construction (assuming, arguendo, that the litigation had impeded construction) simply by dismissing its Complaint. Thus, if RBC had really wanted to construct, and if RBC had really been prevented from doing so by the pendency of the Miami Tower Litigation, then RBC could unilaterally have removed that impediment. But RBC did not do so because of Mr. Rey's competitive concerns:

Q: Is it true that if [RBC] had dismissed [the Miami Tower Litigation] you could have proceeded with construction?

Rey: Yes, that's true, and it could have been [a] worthless CP, and I would have chosen maybe to give it back to the FCC or something like that at that time. In November or December of 1990, that's what I believed.

B. Issue Concerning Misrepresentation/Lack of Candor
Surrounding RBC's Financial Qualifications

170. With respect to the Financial Qualification Misrepresentation/Lack of Candor Issue, RBC represented in both of its 1991 extension applications that it was financially qualified. In its January, 1991 extension application, it further elaborated that it was "ready, willing and able to proceed with construction". Similarly, in its June, 1991 extension application, RBC specifically and unconditionally represented that RBC was proceeding with construction, a representation which RBC repeated in a November, 1991 supplement to that application. Clearly, RBC was representing to the Commission that RBC was, inter alia, financially qualified to construct and operate its station as of that time.

171. But the evidence conclusively establishes that RBC was not financially qualified to construct and operate at that time. See supra at, e.g., Paragraphs 60-102. Even assuming that Mr. Conant had ever actually made any financing commitment to RBC -- and the evidence indicates that no such commitment had ever been made -- the fact is that that commitment was not available during the period November, 1990 to at least June, 1991, i.e., the precise period during which RBC was asserting its financial qualifications to the Commission. Id. And again, the non-availability of Mr. Conant's financing was attributable, at least in substantial part, to Mr. Rey: according to his own testimony, because of his perception of the then-prevailing competition in the Orlando television marketplace, he chose not to risk

Mr. Conant's money; instead, any loan from Conant was put on hold at that time. Id. ^{50/} Thus, RBC's claims of financial qualifications were misrepresentations, and its suggestions of financial qualification (e.g., its repeated statements that it was proceeding with construction when, in fact, that was not the case) were lacking in candor.

172. As with the Failure to Construct Misrepresentation Issue, there is no question but that Mr. Rey was aware of the falsity of his claims. Id. In the Miami Tower Litigation, he had signed the complaint initiating that case in November, 1990, a complaint which included, on its face, express admissions that RBC was not then financially qualified. Id. Mr. Rey then confirmed, under oath, those admissions during his testimony in the Miami Tower Litigation, testimony which was given in January, 1991, a matter of weeks prior to his execution of the January, 1991 extension application. Id. And yet, in that extension application, RBC held itself out to the Commission to be fully qualified, and RBC persisted in maintaining that position for more than five years thereafter. Id.

173. Also as with the Failure to Construct Misrepresentation Issue, RBC had an obvious, improper motive for its misrepresentation. RBC was presumably reluctant to admit that it was no longer financially qualified, because to do so

^{50/} Of course, the evidence also indicates that Mr. Conant had told Mr. Rey that any financing was "on hold" and that Mr. Conant would take a "wait and see" attitude in light of Mr. Rey's concerns about the competitive marketplace.

might have impeded the grant of its extension application(s).

174. Finally, Mr. Rey's less than candid and less than credible testimony at the hearing (see supra at, e.g., Paragraphs 150-153) itself underscores the unavoidable conclusion that RBC (and Mr. Rey) are inclined to dissemble and mislead to the extent that they may believe necessary to serve their own purposes. This adds further support to the conclusion that RBC, through Mr. Rey, affirmatively and knowingly misrepresented in its January, 1991 and June, 1991 extension applications that RBC was then financially qualified.

175. Accordingly, it is concluded that RBC engaged in misrepresentation and/or lack of candor with respect to its statements in its January, 1991 and June, 1991 extension applications concerning its financial qualifications to construct and operate the station.

III. The Section 73.3598(a)/73.3534(b) Issue

176. The Commission has made clear that, when it issues a construction permit, it expects the permittee to proceed diligently with the construction of the station. E.g., Broadcast Construction Periods, 102 FCC 2d 1054 (1985). Under Section 73.3534, an applicant for an extension of a permit is required to make one of three showings. The applicant must demonstrate either that (a) construction is complete or (b) substantial progress has been made (equipment is on hand, site is acquired and cleared, construction is proceeding toward completion), or (c) no progress has been made due to

circumstances clearly beyond the permittee's control. E.g., Community Service Telecasters, Inc., 6 FCC Rcd 6026 (1991); Panavideo Broadcasting, Inc., 6 FCC Rcd 5260 (1991); Golden Eagle Communications, Inc., 6 FCC Rcd 5127 (1991); High Point Community Television, Inc., 2 FCC Rcd 2506 (1987); Metrovision, Inc., 3 FCC Rcd 598 (Video Services Division 1988). As the full Commission held in Golden Eagle,

[t]he only bases for grant of an extension where construction has not been completed or testing is not underway are substantial and sustained progress or circumstances beyond the permittee's control that prevented the construction.

Golden Eagle, supra, 6 FCC Rcd at 5129, ¶10 (emphasis added).

The Commission clearly expects construction efforts to be diligent and on-going, and a permittee is not allowed to begin some preliminary construction-related projects early in the process and then simply to sit back and obtain extensions ad infinitum on the basis of those initial efforts. E.g., Golden Eagle, supra, 6 FCC Rcd at 5129, ¶10. ^{51/}

177. In its 1991 extension applications, RBC sought to satisfy the requirements of Section 73.3534 by claiming generally that construction had been "delayed" by the "dispute" with Gannett. As discussed above, however, the record of this proceeding unquestionably establishes that RBC's failure to

^{51/} In Golden Eagle, the full Commission stated that "a permittee's extension application will be judged according to the progress made during the most recent construction period. If this were not so, a permittee would partially construct a station and then obtain extensions indefinitely, based on that initial construction. Such a result would be contrary to . . . our policies." 6 FCC Rcd at 5129, ¶10.

construct was not caused by that dispute. See supra at, e.g., Paragraphs 31-59. To the contrary, it is clear beyond argument that RBC's failure to construct was solely attributable to RBC's own voluntary decision not to proceed with construction. And the record is equally clear that that voluntary decision was motivated solely by the reluctance of RBC (and Mr. Rey) to proceed with construction of a station which would, at least in Mr. Rey's opinion, be "worthless" because of the competitive environment in the Orlando television marketplace. See supra at, e.g., Paragraphs 31-59.

178. But it is well-established that the avoidance of competition is not a valid justification for failure to construct. E.g., New Orleans Channel 20, Inc., 100 FCC 2d 1401 (MMB 1985), application for review denied, 104 FCC 2d 304, 313 (1986), aff'd sub nom. New Orleans Channel 20, Inc. v. FCC, 830 F.2d 361 (D.C. Cir. 1987); Community Service Telecasters, Inc., supra; Panavideo Broadcasting, Inc., supra. See also Carolyn S. Hagedorn, supra, 11 FCC Rcd at 1697, ¶20 (delay caused by "purely business reasons" not justified); Deltaville Communications, supra at ¶12 ("entirely voluntary" delay based on "independent business judgment" not justified). ^{52/} Since the avoidance of competition is the only reason that RBC voluntarily

^{52/} It must also be noted that the source of Mr. Rey's delay -- i.e., the competitive environment in the Orlando television marketplace -- was clearly known to Mr. Rey and RBC well in advance of November, 1990. See, e.g., Tr. 765 (Mr. Rey testifies that he was aware of the possibility of a "sixth station" in the market as early as 1985).

declined to proceed with construction, it is clear that RBC has failed to satisfy the requirements of Section 73.3534.

179. With respect to Section 73.3598, that section merely specifies, in relevant part, that television construction permits shall be issued for initial terms of two years each. The issue designated in the HDO relative to that section permitted the adduction of evidence which might support a waiver of that section. It does not appear, however, that RBC has proffered any evidence at all in support of such a waiver. Thus, no basis for a waiver can be found.

180. And even if RBC's overall evidentiary showing were to be given every possible benefit of the doubt, it would still be impossible to find any basis for such a waiver. RBC had had its permit for at least two years as of April, 1988. It was then granted no fewer than five separate extensions of six months each, more than doubling the original construction period. And, while RBC's fifth extension period technically expired in August, 1991, RBC had filed a timely application for extension of the permit in June, 1991, and therefore the permit remained valid and outstanding until that application was disposed of, i.e., until June 17, 1993 -- almost two additional years. Thus, in reality RBC had not only its original two years to construct, but an additional 2-1/2 years arising, de jure, from the grant of its first five extension applications, and an additional 22 months beyond that arising, de facto and de jure, from the on-going pendency of its June, 1991 extension application. See, e.g.,

Radio Longview, Inc., 19 FCC 2d 966, 970, n. 4 (1969) ^{53/}; MG-TV Broadcasting Co. v. FCC, 408 F.2d 1257, 1261 (D.C. Cir. 1968) ("It is well settled that a [broadcast] construction permit does not 'lapse', notwithstanding a failure to abide by its terms, until the Commission declares it forfeited"); Broadcast Construction Periods, supra. In other words, RBC had at least approximately six years in which to construct -- some three times the normal construction period.

181. As is abundantly clear in this record, RBC did not avail itself of any of that initial six-year construction period. Instead, it voluntarily declined to take any meaningful steps toward construction during that time. Under the circumstances, the evidentiary record, even construed as favorably as possible to RBC, does not support any waiver of Section 73.3598 of the Commission's Rules.

182. In sum, then, no basis exists for grant of any extension of RBC's construction permit, and no basis exists for waiving the broadcast license term limitation. Thus, it is concluded that RBC's above-captioned applications for extension of its construction permit must be denied.

^{53/} In Radio Longview, Inc., 19 FCC2d at 970, n.4, the Commission expressly instructed permittees to continue construction efforts while extension applications are pending:

the progress or construction made after the filing of an extension application may be determinative in deciding whether or not an extension will be approved. Therefore our permittees are advised that the filing of an extension application will not excuse them from their obligations to continue with the construction of their proposed facilities.